(4)

No. 95-424

Supreme Court, U.S.
FILED
NOV 28 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

PETER G. BANTA
Counsel of Record
DONALD A. KLEIN
CRAIG L. LEVINSON
WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Attorneys for Respondents
25 Main Street
Hackensack, New Jersey 07601
(201) 487-3800

7346
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

53 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should exercise jurisdiction over claims, alleged to arise under the laws or Constitution of the United States, which were not raised in the courts below.

2. Whether the incremental extension of a defamation liability standard by the New Jersey Supreme Court to plaintiffs engaged in violations of the New Jersey Consumer Fraud Act violates the plaintiffs' right to equal protection under the Fourteenth Amendment to the United States Constitution.

3. Whether the similar treatment by the New Jersey Supreme Court of an individual and the business which he owned and operated violates the individual's right to equal protection under the Fourteenth Amendment to the United States Constitution.

4. Whether the adoption of a common law standard of defamation by a state court raises a federal question because the standard is similar to a standard made applicable to public official and public figure defamation by the First and Fourteenth Amendments to the Constitution of the United States.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The parent company of respondent Bergen Record Corporation is Macromedia, Incorporated, a New Jersey corporation. Macromedia, Incorporated has no subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF AUTHORITIES vii

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THIS COURT LACKS JURISDICTION OVER THE JUDGMENT OF THE NEW JERSEY SUPREME COURT 3

A. The "federal" issues set forth in the Petition for Certiorari were not raised below -- a failure that is fatal to petitioners' position. . . . 3

B. In any event, the issues raised in the Petition are fundamentally state common law, not federal law, issues. 6

II. THE RELIANCE OF THE NEW JERSEY COURTS ON AN "ACTUAL MALICE" STANDARD TO DETERMINE THE BURDEN A PLAINTIFF MUST MEET AS TO A PUBLICATION ON A MATTER OF PUBLIC CONCERN DOES NOT CREATE AN ISSUE OF FEDERAL LAW 6

A. Reputation is not a federal constitutionally protected right. 6

B. The New Jersey Supreme Court applied an actual malice standard in this case as a matter of state common law, not federal constitutional law. 8

C. The New Jersey Supreme Court's definition of state common law privilege does not implicate equal protection rights. 13

III. THE NEW JERSEY SUPREME COURT'S APPLICATION OF THE PUBLIC CONCERN ACTUAL MALICE TEST TO BOTH TURF LAWNMOWER REPAIR AND JOHN GLORIA CREATES NO VIOLATION OF DUE PROCESS OR EQUAL PROTECTION 16

A. Petitioners Turf and Gloria treated themselves interchangeably in their filings in the New Jersey courts. 16

B. Plaintiffs did not raise a distinction between Turf and Gloria until their motion for reconsideration of the New Jersey Supreme Court's decision and, when they did, they made no due process or equal protection argument. 18

C. The treatment of Turf and Gloria by the same actual malice standard is legally correct. 19

IV. THERE IS NO BASIS FOR THE UNITED STATES SUPREME COURT TO REVIEW THE DECISIONS OF THE THREE COURTS BELOW THAT PETITIONERS HAD NOT SHOWN EVIDENCE OF ACTUAL MALICE SUFFICIENT TO WARRANT A TRIAL 20

A. Since the standard of actual malice was adopted by the New Jersey courts as a common law fault standard for publication on matters of public concern, the United States Supreme Court lacks jurisdiction to review its application. 20

B. This Court lacks supervisory authority over the state courts of New Jersey. 21

C. Review of factual determinations by the New Jersey courts in this case is an inappropriate use of the Court's scarce time and resources. . 22

CONCLUSION 25

APPENDIX

EXCERPTS FROM FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL 1a

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO DATED MARCH 9, 1993 FILED WITH APPELLATE DIVISION 4a

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO IN OPPOSITION TO CERTIFICATION DATED FEBRUARY 16, 1994 FILED WITH NEW JERSEY SUPREME COURT 10a

LETTER OF SHANLEY & FISHER, P.C. DATED NOVEMBER 21, 1994 TO STEPHEN W. TOWNSEND, CLERK OF THE NEW JERSEY SUPREME COURT 13a

LETTER OF WINNE, BANTA, RIZZI, HETHERINGTON & BASRALIAN, P.C. DATED NOVEMBER 21, 1994 TO NEW JERSEY SUPREME COURT 15a

EXCERPTS FROM PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION DATED MARCH 27, 1995 FILED WITH NEW JERSEY SUPREME COURT 17a

TABLE OF AUTHORITIES

Cases Cited:

Abella v. Barringer Resources, Inc.,
260 N.J. Super. 92, 615
A.2d 288 (Ch. Div. 1992) 21

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 11

Bainhauer v. Manoukian, 215 N.J. Super. 9,
520 A.2d 1154 (App. Div. 1987) 21

Bankers Life & Casualty Co. v. Crenshaw,
486 U.S. 71 (1988) 5

Binkewitz v. Allstate Ins. Co.,
222 N.J. Super. 501, 537 A.2d 723
(App. Div. 1988) 21

*Bose Corp. v. Consumers Union of United
States, Inc.*, 466 U.S. 485 (1984) 24

*Brill v. The Guardian Life Insurance
Company*, ___ N.J. ___, ___
A.2d ___, 1995 N.J. LEXIS 1040
(No. A-123-94, October 24, 1995) 12

Burke v. Deiner, 97 N.J. 465,
479 A.2d 393 (1984) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11

Curtis Publishing Co. v. Butts,
388 U.S. 130 (1967) 8

Dairy Stores, Inc. v. Sentinel Publishing Co.,
104 N.J. 125, 516 A.2d 220
(1986) 8, 10, 12, 16, 19, 21

Erickson v. Marsh & McLennan Co., Inc.,
117 N.J. 539, 569 A.2d 793 (1990) 21

Fees v. Trow, 105 N.J. 330,
521 A.2d 824 (1987) 21

Gallo v. Princeton University,
281 N.J. Super. 134, 656 A.2d
1267 (App. Div.), *certif. den.*
142 N.J. 453, 142 A.2d 453 (1995) 21

Gertz v. Robert Welch, Inc., 418 U.S.
323 (1974) 7, 8, 15, 16

Geyer v. Faiella, 279 N.J. Super. 386,
652 A.2d 1245 (App. Div. 1995) 21

Harte-Hanks Communications, Inc. v. Connaughton,
491 U.S. 657 (1989) 24

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 14

*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio
Corp.*, 475 U.S. 574 (1986) 11

McNabb v. United States, 318 U.S. 332 (1943) 22

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 8

Paul v. Davis, 424 U.S. 693 (1976) 7

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 8

Schiavone Construction Co. v. Time, Inc.,
619 F.Supp. 684 (D.N.J. 1985) 19

Schiavone Construction Co. v. Time, Inc.,
847 F.2d 1069 (3d Cir. 1988) 19

Schwartz v. Worrall Publications, Inc.,
258 N.J. Super. 493, 610 A.2d
425 (App. Div. 1992) 11

Siegert v. Gilley, 500 U.S. 226 (1991) 7

Sisler v. Gannett Co., Inc., 104 N.J. 256,
516 A.2d 1083 (1986) 8, 10, 12, 16, 19, 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 24

Williams v. Bell Tel. Lab., Inc.,
132 N.J. 109, 623 A.2d 234 (1993) 21

Wolston v. Reader's Digest Ass'n, Inc.,
443 U.S. 157 (1979) 14

Statutes and Rules Cited:

28 U.S.C. §1257(a) 1, 6

N.J.S.A. 56:8-1 *et seq.* 2

Supreme Court Rule 14.1(h) 3

United States Constitution Cited:

First Amendment 8, 24

Fourteenth Amendment 7, 8, 16, 24

Other Authorities Cited:

Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181 (1969) 22

Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963) 22

Restatement (Second) of Torts 21

No. 95-424

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, David Hall and Byron Campbell respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the New Jersey Supreme Court's opinion in this case. That opinion is reported at 139 N.J. 392, 655 A.2d 417 (1995).

JURISDICTION

Respondents dispute the existence of jurisdiction of this Court to review the judgment of the New Jersey Supreme Court under 28 U.S.C. §1257(a) for the following reasons: (a) no federal question arising under a federal statute or provision of the United States Constitution and amendments thereto is involved; and (b) any alleged federal questions asserted by petitioners were not timely or properly raised in the courts below.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case misstates both the proceedings and the holdings of the courts below. It also distorts the evidence in the record.[1]

For example, the Petition states that the holding of the New Jersey Supreme Court -- that the common law public concern privilege should apply to consumer fraud reports -- was "even uninvited by the briefs submitted by the defendants" (Pet.3). That is simply not true. The two lower courts had found that doing business with the consuming public was sufficient to invoke the actual malice standard (Pet.57a, 69a). The decision of the New Jersey Supreme Court substantially narrowed the prior holdings, by holding that while merely doing business with the public would not be sufficient, engaging in acts violative of the Consumer Fraud act would be. While defendants believed that the broader rulings below were proper (and two concurring New Jersey Supreme Court Justices agreed), the public policy of the Consumer Fraud Act was brought to the attention of the

---

[1]The attention of this Court is directed to the description of the litigation set forth in the opinion of the New Jersey Supreme Court (Pet.App.B).

appellate courts (and to petitioners) in both defendants' Appellate Division brief (App. 7-8), and in defendants' Brief in Opposition to Certiorari filed with the New Jersey Supreme Court (defendants noting in the latter that "[l]egislation like the New Jersey Consumer Fraud Act N.J.S.A. 56:8-1 *et seq.*) underscores the legitimate public interest in protecting consumers who purchase products or services").

At oral argument in the New Jersey Supreme Court, plaintiffs' counsel made no claim of surprise when violations of the Consumer Fraud Act were raised as a basis for applicability of the actual malice standard. Rather, he vigorously argued the merits of the issue to the Court.

Petitioner's argument that "defendants' allegations of consumer fraud engendered a public controversy" (Pet.3-4) -- critical to their claim that "defendants were permitted to create their own defense" (Pet.4) -- misrepresents the New Jersey Supreme Court decision. Contrary to petitioners' assertions, the New Jersey Supreme Court did not reason that rather than "the activity of plaintiffs," it was "the reporting activity of the defendants themselves" that required plaintiffs to satisfy the federal actual malice standard (Pet.7). In fact, the Court held the direct opposite -- in applying a common law actual malice standard. *See* discussion *infra*, Point II.

Although petitioners later modified their misstatement (Pet.5), the New Jersey Supreme Court never said, as petitioners claim in their introductory sentence, that they "suffered grave wrong and the loss of their livelihood" as a result of "the gross negligence" of defendants (Pet.3). In fact, the comments cited by petitioners were made by the New Jersey Supreme Court in the context of its unequivocal determination that defendants never doubted the truth of the subject article (Pet.43a).

Nowhere in their Statement of the Case do petitioners acknowledge that this is a common law privilege case, not a public official or public figure case. The New Jersey Supreme Court's reference to federal cases (Pet.5) was by way of analogy, not controlling precedent. A state court's application of an actual malice standard in such context, whether consistent or not with federal decisions, raises no federal question.

In any event, petitioner's effort to raise "federal" issues (Pet.5-6) is predicated on misrepresentations of, and half-truths about, the record in this case. Petitioners' claimed evidence of actual malice (Pet.6, 19-20) is a rehash of arguments made to, and rejected by, three courts below. The distortions in petitioners' description of the "evidence" were set forth in respondents' briefs below (for a sample, see App. 5-7, 8-9, 11-12) -- and were rejected by each of the courts below. None of the deficiencies alleged went to the issue of subjective knowledge of falsity or reckless disregard for the truth -- that is at the heart of the actual malice standard.

REASONS FOR DENYING THE WRIT

I

THIS COURT LACKS JURISDICTION OVER THE JUDGMENT OF THE NEW JERSEY SUPREME COURT.

A. The "federal" issues set forth in the Petition for Certiorari were not raised below -- a failure that is fatal to petitioners' position.

Rule 14.1(h) of the Supreme Court Rules (as in effect when the Petition was filed) states:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in paragraph .1(k) of this Rule.

Petitioners' Statement of the Case contains no specification of when or how the "federal" issues now asserted were raised below. In fact, no argument based on denial of equal protection was ever made to any New Jersey state court. On the contrary, to the extent arguments generally similar to those in the Petition were made to the New Jersey courts, no reference was made by plaintiffs to any federally created right protecting plaintiffs or to any federally based standard governing the rights of the parties. See, e.g., the discussion *infra*, Point III (no federal constitutional issue was raised below as to the application of the actual malice test to both Turf Lawnmower Repair and John Gloria).

The United States Supreme Court has made clear in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) that failure to specifically raise federal issues in the state courts forecloses Supreme Court review:

> Appellant maintains that it raised its various challenges to the size of the punitive damages award in its petition for rehearing before the Mississippi Supreme Court. * * * But appellant's petition for rehearing alleged only that the punitive damages award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." App. to Juris. Statement 139a. The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. Cf. Taylor v. Illinois, 484 U.S. 400, 407 n9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights ...").
>
> * * * As this Court stated in Webb v. Webb, 451 U.S. 493, 501 (1981), "[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law."

486 U.S. at 77-78.

Obviously, the assertion by petitioners of equal protection violations is an afterthought, designed solely to confer jurisdiction on this Court to review the adverse decision below. However, the history of this Court's practice and precedent is that jurisdiction will not be found under 28 U.S.C. §1257(a) unless the alleged federal issues were asserted and addressed below.

B. In any event, the issues raised in the Petition are fundamentally state common law, not federal law, issues.

See discussion *infra*, Points II to IV. Petitioners' attempt to belatedly recharacterize, in federal terms, the New Jersey Supreme Court's application of state law is unavailing.

II

THE RELIANCE OF THE NEW JERSEY COURTS ON AN "ACTUAL MALICE" STANDARD TO DETERMINE THE BURDEN A PLAINTIFF MUST MEET AS TO A PUBLICATION ON A MATTER OF PUBLIC CONCERN DOES NOT CREATE AN ISSUE OF FEDERAL LAW.

A. Reputation is not a federal constitutionally protected right.

Petitioners' first argument point is premised on their "constitutionally protected right in their good name and reputation and their rights to equal protection of the law" (Pet.8). However, there is no such federal constitutionally protected right; the only federal mandates are constitutional limits on state-created causes of action for defamation.

This Court has explicitly recognized that there is no federally created right to be free from defamation. *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991):

> Defamation, by itself, is a tort actionable under the laws of most states, but not a constitutional deprivation.

See also Paul v. Davis, 424 U.S. 693 (1976) (rejecting a claim that defamation by a state officer deprived a plaintiff of rights secured to him by the Fourteenth Amendment to the United States Constitution). Contrary to petitioners' argument (Pet. 8-9), the United States Supreme Court did not recognize a constitutional right to protection of one's good name and reputation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); rather, the Court there specifically acknowledged the state law basis for libel:

> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.
>
> * * *
>
> [W]e conclude that the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

418 U.S. at 341, 345-46.

B. The New Jersey Supreme Court applied an actual malice standard in this case as a matter of state common law, not federal constitutional law.

Until *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) defamation was regarded as a common law tort, without constitutional significance. That case and its progeny recognized *limitations* on a plaintiff's right to relief, based on First Amendment and Fourteenth Amendment considerations.[2]

In *Gertz* the United States Supreme Court limited federal constitutional protection to statements about "public officers" and "public figures." However, as the New Jersey Supreme Court noted in its opinion below (Pet.53a-54a), *Gertz* left open to the states the definition of appropriate standards of liability in other types of cases. Nine years ago, the Supreme Court of New Jersey, as a matter of state common law, applied the actual malice standard to comment on a regulated product affecting health (*Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220 (1986)) and on activities of an individual in a highly regulated industry (*Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 516 A.2d 1083 (1986)).

In *Dairy Stores* the New Jersey Supreme Court rejected rulings of its lower courts that defendant was a public figure under federal constitutional guidelines, noting:

> Although constitutional considerations have dominated defamation law in recent years, the common law provides an

---

[2]These are, briefly, the actual malice fault standard as applied to actions by public officials (*New York Times v. Sullivan*) and by public figures (*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)); the prohibition in all other cases of the imposition of liability without fault and restrictions on presumed damages and punitive damages in public concern cases absent a showing of actual malice (*Gertz*); the requirement that plaintiffs prove falsity in actual malice and public concern cases (*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

> alternative, and potentially more stable, framework for analyzing statements about matters of public interest.
>
> Another reason for turning to the common law is that the constitutional concepts do not comfortably fit the activities or products of a corporation.

104 N.J. at 139, 516 A.2d at 227. Concluding that New Jersey's common law privilege of fair comment should be extended to a newspaper article critical of a store selling possibly adulterated bottled water, New Jersey's highest court applied an actual malice standard to determine if the privilege was overcome. While analogizing to the federal standard, the New Jersey Supreme Court adopted an actual malice standard as a matter of state common, not federal constitutional, law:

> The fair comment defense, the purpose of which is to foster the discussion of matters of legitimate public concern, is closely related to the constitutional protection accorded to statements about public officials and public figures. Although the adoption of the actual malice test is not constitutionally compelled, *Restatement (Second)*, *supra*, §580B comment c; 2 Harper, James & Gray, *supra*, §5.27 at 233-34, we conclude that the defense of fair comment, like the constitutional protection, should be overcome only by proof of actual malice. *See Burke v. Deiner*, 97 N.J. 465, 476-77 (1984).

104 N.J. 150-51, 516 A.2d at 233.

Similarly, in *Sisler* the New Jersey Supreme Court grounded its application of an actual malice standard in common law, not federal constitutional, principles:

> In contradistinction from the federal view, we do not deem it unfair to favor free speech over the reputational interests of an individual who has voluntarily and knowingly engaged in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny.
>
> * * *
>
> We conclude that in such a case the interests of free speech justify, and fairness to individual reputation permits, application of a strict and high burden of proof to establish actionable defamation. This is encompassed by a standard akin to the "actual malice" standard of *New York Times v. Sullivan.*

104 N.J. at 274-75, 516 A.2d at 1092-93.

Precisely because application of an actual malice test in cases of public concern was a common law adoption, the New Jersey courts have consistently applied the state, not the federal, summary judgment test in such cases. In *Dairy Stores*, for example, the New Jersey Supreme Court declared itself not bound by the federal summary judgment rule, stating:

> Under federal law, *Liberty Lobby* would compel granting defendants' motion for summary judgment. As previously indicated, however, our decision is predicated on actual

> malice as a common-law concept. So viewed, our duty is to review the propriety of the summary judgment as a matter of state law.

104 N.J. at 156, 516 A.2d at 236. *See also Schwartz v. Worrall Publications, Inc.*, 258 N.J. Super. 493, 501, 610 A.2d 425, 429 (App. Div. 1992):

> [W]here actual malice is implicated as a common-law concept in the application of common-law privileges, the traditional test for summary judgment applies because the evidentiary burden at trial is not controlled by *New York Times*.

Further, as the New Jersey Supreme Court noted this past year in adopting, as a matter of state law, new summary judgment standards based in part on the *Matsushita/Liberty Lobby/Celotex* trilogy of federal cases:[3]

> *Dairy Stores*, supra, 104 N.J. at 125, was decided only four months after *Liberty Lobby* and *Celotex*. We noted in *Dairy Stores*, *id.* at 155-56, that we were not bound to follow the rule announced in *Liberty Lobby*. We reasoned that *Dairy Stores* involved actual malice as a common-law bar to the defense of fair comment, while *Liberty Lobby* involved actual malice as a constitutionally mandated component of a defamation action brought by a public official or public person. *Ibid.*

---

[3] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Brill v. The Guardian Life Insurance Company, ___ N.J. ___, __A.2d ___, 1995 N.J. LEXIS 1040, *29 (No. A-123-94, October 24, 1995).

The progeny of *Dairy Stores* and *Sisler*, the New Jersey Supreme Court decision which is the subject of the Petition, while looking to corroborative federal law principles,[4] is firmly rooted in state common law:

> The law of New Jersey parallels the complex, yet ever changing law of defamation in both federal and other state courts.
>
> * * *
>
> In *Dairy Stores* and *Sisler*, we constructed a test to reflect public policy considerations often ignored in other states.

---

[4]Justice Pollock's reference to the majority's "excessive reliance on federal cases and their reliance on the concept of 'actual malice'" (Pet.16n.1) does not mean that the actual malice standard is federalized in this case. As his opinion for the Court in *Dairy Stores* made clear, Justice Pollock believed that the term "actual malice" was confusing and preferred a less ambiguous statement of the applicable standard:

> Although we discard the label, we adhere to the principle that to overcome a qualified or conditional privilege, a plaintiff must establish that the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity. *Restatement (Second), supra, §600.* With or without the term, the critical determination is whether, on balance, the public interest in obtaining information outweighs the individual's right to protect his or her reputation. *Coleman v. Newark Morning Ledger Co., supra*, 29 N.J. at 376.

104 N.J. at 151, 516 A.2d. at 233.

* * *

> The public [has] a legitimate interest in any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern. When the media addresses those issues of legitimate and compelling public concern, the actual-malice standard of proof will apply, regardless of the type of business involved. In so ruling, we seek a balance between a private person's right of privacy and the public's right to know of various dangers in our society.

(Pet.21a, 23a, 28a).

C. The New Jersey Supreme Court's definition of state common law privilege does not implicate equal protection rights.

Contrary to petitioners' argument, the New Jersey Supreme Court's adoption of an actual malice standard where a publication involves allegations of consumer fraud raises no federal question.

Petitioners claim that the New Jersey Supreme Court in this case looked to defendants' actions, rather than to the activities of plaintiffs (Pet.9-13). That is simply not true. *See* Pet.32a, 34a:

> What constitutes consumer fraud depends not on the manner of investigation employed by the media to capture the story, but generally on whether the alleged activities of the business would constitute a cause of action under the Consumer Fraud Act.

* * *

> In determining whether plaintiff has introduced sufficient evidence to show that the article fails to set forth acts of consumer fraud that raise matters of legitimate public concern, the reporter's conduct is irrelevant. Rather, we focus on Turf's actions.[5]

Untrue too is petitioners' claim that "[a]ll a media defendant needs to do is simply include in its report a single sentence that could be construed to implicate a consumer fraud statute and *ipso facto* the entire article will be protected by the actual malice standard" (Pet.9). As the New Jersey Supreme Court stated:

> [T]he article must deal primarily with consumer fraud viewed as a whole in light of all surrounding circumstances.

(Pet.32a). Petitioners further ignore the careful and detailed analysis made by the New Jersey Supreme Court of the subject article (Pet.34a-40a), which led to the Court's conclusion that "[b]ecause defendants' article described sufficient uncontradicted assertions of Turf's conduct that, if true, would be sufficient to support a complaint of consumer fraud under the Act, we find Locklin's article is well

---

[5]*Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), cited by petitioners, are public figure cases in which at issue was whether defendants could bootstrap plaintiffs' public figure status by relying on the effect of the subject publications. In this case, the common law privilege (applicable to consumer fraud reports) is defined by the Court based on plaintiffs' prepublication activities.

grounded in consumer fraud" (Pet.40a).[6] In short, petitioners' equal protection argument is based on fundamental distortions of the New Jersey Supreme Court's opinion.

Petitioner's "federal" issue argument also disregards the legal context of the New Jersey Supreme Court's ruling. This is neither a public official nor a public figure case. It is a common law privilege case -- clearly within the parameters set by *Gertz*, which allow states to contract the boundaries of defamation and create their own privileges. The New Jersey Supreme Court has ruled that reports on matters of public concern are entitled to a heightened fault standard and, in the subject case, has held -- in a ruling that substantially limits broader decisions by the trial and intermediary appellate courts[7] -- that consumer fraud reports are matters of public concern. That ruling raises no equal protection issue; the distinctions drawn by the New Jersey state courts in defining the scope of common law privilege are neither arbitrary nor capricious. Contrary to *Gertz*, petitioners' argument would vitiate the ability of states to

---

[6]Obviously, the New Jersey Supreme Court relied on the various, corroborative sources for the article, contrasting the situation where "if the sole source of an article is a disgruntled, fired employee, or a sole competitor, a court could conclude that that evidence alone would not be sufficient to support an action that a plaintiff's conduct violated the [Consumer Fraud] Act" (Pet.36a).

[7]Indeed, the New Jersey Supreme Court did precisely what petitioners (in opposing an amicus application) urged it to do:

> Instead of extending broad privileges to the media, this Court should continue to adhere to the majority trend of narrowly defining those instances where qualified privileges attach.

(Plaintiffs' August 17, 1994 Brief in Reply to the Brief of *Amicus Curiae* New Jersey Press Association, p.6).

define their respective defamation laws and could be applied with equal force to *Dairy Stores* and *Sisler*.

III

THE NEW JERSEY SUPREME COURT'S APPLICATION OF THE PUBLIC CONCERN ACTUAL MALICE TEST TO BOTH TURF LAWNMOWER REPAIR AND JOHN GLORIA CREATES NO VIOLATION OF DUE PROCESS OR EQUAL PROTECTION

A. Petitioners Turf and Gloria treated themselves interchangeably in their filings in the New Jersey courts.

Petitioners' argument that the New Jersey Supreme Court's treatment of John Gloria as indistinct from his corporation violates his rights under the Fourteenth Amendment to due process and equal protection is disingenuous. The article sued on recognized Gloria as the alter ego and moving force behind Turf, which Gloria has repeatedly acknowledged in his pleadings. Also, none of the allegations complained of by plaintiffs related to Gloria individually; they related only to his relationship with Turf.

In their Amended Complaint, plaintiffs made no distinction between Turf and Gloria after the introductory paragraphs, which described Turf as the operator of the lawnmower business (¶1) and Gloria as its president and sole owner for ten years prior to August 21, 1988 (¶2) (App. 1-3). Plaintiffs continued to equate Turf and Gloria in their briefs in opposition to summary judgment in the state courts, failing to distinguish between the two. Indeed, plaintiffs commenced the Preliminary Statement of their Appellate Division brief with the following sentence:

> For nearly ten years, John L. Gloria ("Gloria") operated his lawnmower repair business, Turf Lawnmower Repair, Inc. ("Turf"), in Teaneck, achieving an admirable record of growth and customer satisfaction.

(Plaintiffs' January 7, 1993 Appellate Division Brief, p.1). The New Jersey Supreme Court did not separately decide Gloria's status, as that was not raised to the Court prior to its decision in March 1995.

Petitioners also ignore the fact that the only allegedly defamatory statements identified in the Amended Complaint (¶21) related to the activities of Turf (including Gloria as owner) (App. 2-3). None related to Gloria individually -- e.g., "to the car he drove, to the value and location of his home, [or] to his family life" (Pet.13). *See, e.g.,* the Appellate Division opinion below:

> Although it is clear that Gloria is not a public figure or official and that he is, therefore, protected by a broader zone of privacy than a public figure or official would be, the contents of defendants' article had nothing to do with those of Gloria's interests which are properly encompassed within his zone of privacy.
>
> * * *
>
> Every comment complained of in the offending article dealt with Gloria's activities in the business of plaintiff Turf, which we hold to be of legitimate public interest; or with his activities in politics, which are *per se* matters of legitimate public interest.

(Pet.57a-58a). As evidenced by the timing of plaintiffs' first reference to a distinction between Turf and Gloria, petitioners' present argument is an after-the-fact, bootstrap attempt to resurrect a lost argument.

B. Plaintiffs did not raise a distinction between Turf and Gloria until their motion for reconsideration of the New Jersey Supreme Court's decision and, when they did, they made no due process or equal protection argument.

For the first time, in Point I(A) of their Brief in Support of Motion for Reconsideration, filed with the New Jersey Supreme Court after its March 1995 decision, petitioners argued for a distinction between Turf and Gloria as to application of the actual malice standard (App. 18). No cases were cited to support plaintiffs' conclusion that if the actual malice standard is applied to a business, it should not apply to the "private persons who own or operate the business" (App. 19). Most importantly, petitioners made no argument in the state courts that failure to distinguish Gloria from Turf would deny him due process or equal protection of the law under any law of the United States or under the United States Constitution, and no authorities were cited to such effect.

C. The treatment of Turf and Gloria by the same actual malice standard is legally correct.

The trial court ruled that plaintiffs had conceded applicability of the actual malice standard as to Turf and Gloria and did not rule separately as to them (Pa62). As noted, the Appellate Division dealt specifically with Gloria's status, holding that the actual malice standard applied to him as well as Turf as the statements complained of related to Gloria in his status as owner of Turf. The Supreme Court

agreed on this issue, plaintiffs making no argument to the contrary.

That ruling was clearly correct as a matter of state common law. In defining the scope of common law privilege, the New Jersey Supreme Court -- in *Dairy Stores* and *Sisler* and now in *Turf* -- has applied an actual malice standard to various private individuals or entities because of their relationship to the matter of public concern which invokes the privilege. Given Gloria's conceded alter ego status, such approach was manifestly appropriate in this case.[8]

IV

THERE IS NO BASIS FOR THE UNITED STATES SUPREME COURT TO REVIEW THE DECISIONS OF THE THREE COURTS BELOW THAT PETITIONERS HAD NOT SHOWN EVIDENCE OF ACTUAL MALICE SUFFICIENT TO WARRANT A TRIAL.

---

[8] *Cf. Schiavone Construction Co. v. Time, Inc.*, 619 F.Supp. 684 (D.N.J. 1985) (holding that since Schiavone Construction Co. was a public figure, Ronald A. Schiavone (its founder, president and major owner) was a public figure):

> Plaintiffs' status in this regard is identical one to the other. The court's holding, *supra*, at 26-29, that defamation of Schiavone Construction Co. may be "of and concerning" plaintiff Ronald Schiavone, simply because the two are inextricably intertwined by name and corporate structure, requires that if one is deemed a public figure so must the other be.

619 F.Supp. at 704 n. 13. *See also Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988).

A. Since the standard of actual malice was adopted by the New Jersey courts as a common law fault standard for publication on matters of public concern, the United States Supreme Court lacks jurisdiction to review its application.

The Petition ignores the fundamental fact that the New Jersey state courts adopted an actual malice standard as a matter of state, not federal, law. This is a common law privilege case. The decision appealed from is simply an incremental extension of a state public concern standard adopted by the New Jersey Supreme Court nearly a decade ago. See discussion *supra*, Point II.

Petitioners' argument, if accepted, would have the effect of federalizing all common law privilege cases in New Jersey. This is not insignificant, as actual malice has become the common law standard for abuse of all conditional privileges in New Jersey since the New Jersey Supreme Court's rejection of an ill will standard in *Burke v. Deiner*, 97 N.J. 465, 479 A.2d 393 (1984) and the common law standard for all public concern defamation cases since *Dairy Stores* and *Sisler* were decided by the New Jersey Supreme Court in 1986.[9]

---

[9]*See, e.g., Williams v. Bell Tel. Lab., Inc.*, 132 N.J. 109, 623 A.2d 234 (1993) (statements made to county prosecutor's office charging criminal violations); *Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 569 A.2d 793 (1990) (former employer's response to prospective employer of a discharged employee); *Fees v. Trow*, 105 N.J. 330, 521 A.2d 824 (1987) (report by an employee of abuse by another employee on a resident of a state facility for the developmentally disabled in any civil or criminal proceedings arising from the report); *Gallo v. Princeton University*, 281 N.J. Super. 134, 656 A.2d 1267 (App. Div.) (statements by university officials to university community concerning investigation into misconduct in university department), *certif. den.* 142 N.J. 453, 142 A.2d 453 (1995); *Geyer v. Faiella*, 279 N.J. Super. 386, 652 A.2d 1245 (App. Div. 1995) (statement to U.S. Attorney's office charging criminal

Moreover, since Section 600 of the *Restatement (Second) of Torts* has adopted an actual malice standard for abuse of conditional privilege, petitioners' argument, if accepted, would also have the effect of federalizing all common law privilege cases in states that adhere to the *Restatement*. That too is neither a desirable, nor appropriate, result.

B. This Court lacks supervisory authority over the state courts of New Jersey.

Petitioners ask the Court to review the record as to actual malice in "the exercise of this Court's supervisory authority" (Pet.16). However, petitioners' attempted invocation of the Court's "supervisory authority," which had its origins in *McNabb v. United States*, 318 U.S. 332, 340 (1943), is misplaced. Such "authority" has application only to proceedings of lower federal courts, not to review of a decision of a state's highest court. *See Hill, The Bill of Rights and the Supervisory Power,* 69 Col. L. Rev. 181, 181-82 (1969):

> The supervisory power has been broadly defined by the Supreme Court as encompassing a general authority over the administration of justice *in the inferior or federal courts; . . . . (emphasis added).*

---

violations); *Binkewitz v. Allstate Ins. Co.*, 222 N.J. Super. 501, 537 A.2d 723 (App. Div. 1988) (defamatory words uttered in the course of and with some relation to statutorily required loss appraisal proceedings); *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 520 A.2d 1154 (App. Div. 1987) (statements by surgeon to hospital officials about another doctor's alleged incompetence if made to protect patients); *Abella v. Barringer Resources, Inc.*, 260 N.J. Super. 92, 615 A.2d 288 (Ch. Div. 1992) (financial reports prepared by independent auditors).

See also Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963).

C. Review of factual determinations by the New Jersey courts in this case is an inappropriate use of the Court's scarce time and resources.

Ten New Jersey state court judges, at three levels, have carefully reviewed the voluminous record in this case[10] and unanimously concluded that petitioners did not make a sufficient showing of actual malice to create a jury issue as to abuse of the applicable common law privilege. Common to each of the decisions below was the conclusion that rather than show knowledge of falsity or serious doubts as to the truth, the evidence clearly reflected defendants' firm belief in the truth of the article. Thus, for example, the New Jersey Supreme Court concluded:

> [W]e find that plaintiffs have failed to prove that Locklin ever doubted that Turf's conduct constituted serious consumer fraud practices. Plaintiffs, therefore, have failed to establish that Locklin demonstrated actual malice in his reporting.

---

[10]At the trial level, argument on the proofs of actual malice consumed 160 pages of transcript (Pet.62a). The New Jersey Supreme Court not only reviewed the numerous depositions and affidavits in this case (App. 13), it also reviewed the tape recording of the critical exchange between Locklin and Turf (App. 15-16), obviously rejecting petitioners' mischaracterization of the conversation and its import.

(Pet.43a). *See also* the Appellate Division majority opinion, which agreed with the trial court's detailed findings and conclusions (*see* Pet.74a-76a):[11]

> In order to succeed, plaintiffs must be prepared to show that defendants or any of them "entertained serious doubts about the truth" of the published material. * * * Nothing in the record before us creates a genuine issue of material fact when measured by the heightened proof standard in the light of the need for a "state of mind" showing.

(Pet. 59a) (citations omitted).[12]

The scarce time of nine justices of this Court could hardly be spent in a less productive manner than in second-guessing ten state court judges' unanimous rulings on whether sufficient evidence has been offered to create a jury issue as to a state-created privilege, merely because the test for the scope of the privilege has its intellectual antecedent in rulings on cases involving First and Fourteenth

---

[11]Among other things, the trial court noted that "the comments of each individual to Bruce Locklin were highly detailed and cumulatively very similar," "there were numerous informants," and Locklin "even confronted John Gloria who did not deny the allegations" (Pet.74a-75a).

[12]The concurring judge reached the same conclusion:

> I agree that on the record presented there is no reasonable prospect that the plaintiffs, having concluded discovery in this matter, will be able to establish that these defendants entertained serious doubts as to the truth of the publications, ...

(Pet.63a).

Amendment issues.[13] As Justice Harlan said in *Time, Inc. v. Pape*, 401 U.S. 279, 294 (1971):

> Indeed, it is almost impossible to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional rights.

(Harlan, J. dissenting). *A fortiori*, no such undertaking should be made in this state common law case.

---

[13]This Court has only occasionally undertaken to weigh the factual submissions in defamation cases, and then only when the constitutional standard of public official/public figure was found to be present by the court below. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

PETER G. BANTA
Counsel of Record
DONALD A. KLEIN
CRAIG L. LEVINSOHN
WINNE, BANTA, RIZZI
HETHERINGTON &
BASRALIAN, P.C.
Attorneys for Respondents
25 Main Street
Hackensack, New Jersey 07601
(201) 487-3800

Dated: November 28, 1995

EXCERPTS FROM FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, NJ 07081
(201) 467-2246
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY
L-30435-89

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL, BYRON CAMPBELL, EDWARD MITCHELL d/b/a Eddie's Power Equipment, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.

Defendants.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Turf Lawnmower Repair, Inc. ("Turf"), a corporation of the State of New Jersey with offices located at 746 New Bridge Road, Teaneck, New Jersey 07666 and John L. Gloria ("Gloria"), residing at 535 Reservoir Drive, Franklin Lakes, New Jersey 07417, complaining of the defendants, state as follows:

PARTIES:

1. Plaintiff Turf is a New Jersey corporation that, at the time of the activities of the defendants complained of, engaged in the business of the sale and repair of lawnmowers and other power equipment in Bergen County.

2. Plaintiff Gloria had been the president and sole owner of Turf for nearly ten years prior to August 21, 1988.

* * *

21. Libelous statements contained in the August 21, 1988 article, a true copy of which is attached as Exhibit "A" to this complaint, include, but are not limited to, the following:

(a) the sub-caption of the article states "Tests, ex-workers reveal Teaneck shop deceives, overcharges";

(b) the statement that "Most customers who paid for tune-ups [at Turf] got little more than an oil change and a new spark plug - for which they typically were overcharged $20 to $30";

(c) the statement that "Some [Turf customers] paid for new parts and got used parts from junked mowers";

(d) the statement that "Many [Turf customers] were charged for repair work that was never done";

(e) the statements that "Reporters brought in mowers in need of simple repairs. Each time, Turf recommended or performed unnecessary work";

(f) the statement that "There's a pervasive rudeness at Turf, where employees often add insult to injury";

(g) the statement, attributed to defendant Winners, that plaintiff Gloria "made bogus tune-ups standard procedure";

(h) the statement, attributed to defendants Winners and Vroeginday, that plaintiff "Gloria often lied to customers who brought in mowers that had jammed after hitting something solid";

(i) the statement, attributed to defendant Vroeginday, that "A job that should have cost $20 would cost about $90"; and

(j) the statement, attributed to defendant Livingston, that "Gloria sometimes got vindictive if a customer got impatient".

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO DATED MARCH 9, 1993 FILED WITH APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-159-92T3
ON APPEAL FROM A FINAL JUDGMENT OF
THE SUPERIOR COURT, LAW DIVISION
SAT BELOW HON. MARGUERITE T. SIMON

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs-Appellants,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, and EDWARD MITCHELL d/b/a EDDIE'S POWER EQUIPMENT,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN AND MARY ANNE DE MARCO

WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Court Plaza North
25 Main Street
P.O. Box 647
Hackensack, New Jersey 07602
(201) 487-3800
Attorneys for Defendants-Respondents Bergen Record Corporation, David Hall, Byron

Campbell, Bruce Locklin, and Mary Anne DeMarco

OF COUNSEL:
Peter G. Banta
ON THE BRIEF:
Donald A. Klein
Peter F. Weiss

(p4)

- Plaintiffs describe as logically inconsistent (Pb21) the suggestion that customers "ignored their [Turf] 'guarantees' and brought machines [that had been repaired by Turf] to other dealers." No mention is made of the fact that the Snapper distributor subpoenaed by plaintiffs testified that, notwithstanding Turf's "guarantee," other shops "would be complaining about customers coming in with repair jobs that they paid Turf Lawn Mower for" since "[m]ost of the customers would not go back to Turf" (Pa1657) -- or to the information provided to Locklin by other repair shops (see discussion infra).

* * *

- Plaintiffs argue (Pb49) that Locklin reported that John Gloria had made his first million with $500,000.00 to spare but made no mention of Gloria's real estate dealings. In fact, the subject article states that Gloria's quality controls had slipped "because he was heavily involved in other investments" (Pa38) - a fact acknowledged by Gloria in his interview with Locklin (Pa1481-84).

* * *

(pp29-31)

Prior to publication of the subject article, Locklin asked Gloria to provide a list of satisfied Turf customers; Gloria promised to do so but never did provide the list:

> Q. *** Do you [John Gloria] recall if you told Mr. Locklin that you would call him with references of people who had good experiences at Turf Lawnmower?
>
> A. Yes.
>
> * * *
>
> Q. Do you recall if, in fact, you called Mr. Locklin before the article was published with good references, by which I mean names of people who had favorable experiences with Turf.
>
> A. No, I did not call in any references.

(Pa1462-63)(emphasis added).***

The Gloria Interview. In a prearranged interview, Locklin and De Marco spoke with Gloria at the River Edge Diner a week and a half before the subject article was published (Pa1042, 1102). The purpose of the interview was to confront Gloria with the Record's investigative findings, so that Locklin could reflect Gloria's defense or rebuttal in the article and do any further investigation that might be called for (Pa1042, 1102).

In the interview Gloria did not deny the essential allegations of the subject article (Pa1043, 1102; see also Pb23). Rather (as conceded in his deposition), when

confronted with the results of the Record's investigation, Gloria acknowledged that he had spent too much time away from Turf, that his quality control had slipped, and that he would do better in the future (Pa1043, 1102, 1476-77, 1483-84; see also Pb23).

* * *

(pp44-45)

State legislation and administrative regulations further underscore the legitimate public interest in protecting consumers who purchase products or services like that offered by plaintiffs. See Dalleman v. Elizabethtown Gas Company, 77 N.J. 267, 270-71 (1978):

> The Consumer Fraud Act [N.J.S.A. 56:8-1 et seq.], originally enacted in 1960, is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate. ***
>
> The act as amended and supplemented is administered by the Division of Consumer Affairs, Department of Law and Public Safety. N.J.S.A. 52:17B-124. Detailed administrative regulations have been adopted, pursuant to the act, controlling selling and advertising practices in the areas of consumer sales which are subject to the act. N.J.A.C. 13:45A-1.1 et seq.
>
> The act provides for injunctive relief against unlawful practices, N.J.S.A. 56:8-8, monetary penalties for violation of the act, N.J.S.A. 56:8-13, and also permits a person,

> who suffers a loss due to a method, act or practice declared unlawful under the act, to sue and recover threefold the damages sustained, together with reasonable attorney's fees and costs of suit, N.J.S.A. 56:8-19.

Press reports on consumer matters serve as an important adjunct and indisputably implicate fundamental public interest considerations.

* * *

(p55,fn41)

As evidence of "actual malice," plaintiffs now argue that "[t]he reader was led to believe that Turf performed the tune up as its proposed remedy to the failure of the machine to start, rather than as a measure that Locklin authorized" (Pb52). Yet, this is precisely what happened, as Locklin's notes attest (Pa1072). Locklin did not bring the Bobcat to Turf and request that it be tuned up. When Locklin said it would not start, Turf told him that it probably needed a tuneup -- without even bothering to examine the mower. While plaintiffs try to excuse their conduct by claiming that Angelo, Turf's intake man, was not a mechanic (and arguing, without any support whatsoever, that Locklin knew this to be the case (Pb15, 17)), Angelo (according to his own affidavit (Pa983)) "ran Turf" for six years.

(p56,fn42)

Plaintiffs challenge Locklin's editorial judgment in not reporting that Winners subsequently returned to Turf (because, as he told Locklin, he needed a job) and that he was fired (for offering to do work on the side for customers)(Pb55). What plaintiffs ignore is the detail provided by Winners regarding Turf's practices -- specifics

corroborated by other sources. As Locklin testified, "[e]ach told strikingly similar stories of what occurred at Turf, and it was clear that they had not been in contact with each other for years" (Pa1038).

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO IN OPPOSITION TO CERTIFICATION DATED FEBRUARY 16, 1994 FILED WITH NEW JERSEY SUPREME COURT

SUPREME COURT OF NEW JERSEY
38,043
On Petition for Certification of a
Final Judgment of the Superior Court,
Appellate Division
SAT BELOW:
Michels, P.J.A.D., Kestin, J.A.D.,
and Wefing, J.S.C., t/a

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs/Petitioners,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, and MARY ANNE DE MARCO,

Defendants/Respondents.

BRIEF IN OPPOSITION TO CERTIFICATION

WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Court Plaza North
25 Main Street
Post Office Box 647
Hackensack, New Jersey 07602
(201) 487-3800
Attorneys for Defendants/Respondents, Bergen Record Corporation, David Hall, Byron

Campbell, Bruce Locklin, and Mary Anne DeMarco

Of Counsel:
Peter G. Banta
On the Brief:
Donald A. Klein
Craig L. Levinsohn

(pp16-17)

There is no "fabricated quote" (Masson) issue in this case; nor is there any "fact/opinion" (Milkovich) issue. Rather, plaintiffs rely on one abbreviated quote (Pa12-13) which has substantially the same meaning in edited, as unedited form[29] and a variety of so-called "false inferences" (P11-19) which have been tirelessly raised by plaintiffs in the past and rebutted at length by defendants.[30] Plaintiffs' argument reflects nothing more than an attempt, in contravention of Masson, to challenge defendants' editorial judgments and to rewrite the article to their own liking.

* * *

---

[29]After noting that Turf's salesman told Locklin that his mower could not be fixed, the article quotes the salesman: "We could have got you for $50 or $60" (Pa39). As Locklin testified, this language -- like other language used by Turf during the exchange (e.g., "money is strange") -- seemed similar to what he had heard during his investigation of car repair ripoff joints (Pa1030). "It seemed to be a predisposition towards the customer as a victim" (Pa1696). Editorial deletion of the further comment ("Obviously the tune up might have held you for a week or two or three") does not raise a Masson issue; its inclusion would not have

---

materially changed the meaning of the cited passage in the article.

[30]Defendants refer the Court to the detailed discussion of plaintiffs' scattergun, and meritless, claims at Db2-5, 11-32, 48-64; Pa103-24, 425-51.

(p19,fn34)

[34]*** In their Petition they [plaintiffs] state:

> Although defendants reported that "Turf misdiagnosed problems, recommended work that wasn't needed, and charged for work that wasn't done" (Pa102), De Marco admitted at her deposition that this was not true (Pa657; 955). This is plain evidence of defendants' knowledge of falsity.

(P15) (emphasis in original). De Marco made no such admission at her deposition. The abbreviated quote cited by plaintiffs is immediately preceded in the article by the sentence: "Reporters took mowers there [to Turf] three times" (Pa102) (emphasis added). De Marco, Locklin's research assistant, was involved in only one of the three visits and was only testifying about her particular experience (Pa657), Da11); she, in fact, testified that she believed that Turf "recommended work that wasn't needed" (Da11). The quoted passage of the article is principally supported by Locklin's experiences at Turf.

LETTER OF SHANLEY & FISHER, P.C. DATED NOVEMBER 21, 1994 TO STEPHEN W. TOWNSEND, CLERK OF THE NEW JERSEY SUPREME COURT

[Letterhead of Shanley & Fisher, P.C.]

November 21, 1994

BY HAND DELIVERY

Stephen W. Townsend
Clerk of the Supreme Court
Richard J. Hughes Justice Complex
CN-270
Trenton, New Jersey 08625

Attention: Joseph DeMarco (Personal and Confidential)

Re: Turf Lawnmower Repair, Inc., et al. v.
Bergen Record Corporation, et als.
Supreme Court Docket No. 38,043

Dear Mr. DeMarco:

In response to your request of this office to forward all depositions and affidavits of John Gloria, Bruce Locklin and MaryAnne DeMarco, we enclose the following:

(1) Deposition of Bruce Locklin (6 volumes);
(2) Deposition of John Gloria (6 volumes);
(3) Deposition of MaryAnne DeMarco (3 volumes);
(4) Affidavit of Bruce Locklin;
(5) Supplemental Affidavit of Bruce Locklin;
(6) Affidavit of John Gloria;
(7) Supplemental Affidavit of John Gloria;
(8) Rebuttal Affidavit of John L. Gloria.

The tapes of the June 3 and August 3 encounters between Locklin and Turf personnel are attached to the Supplemental Affidavit of Bruce Locklin. MaryAnne DeMarco did not file any affidavits in support of the motion for summary judgment.

Kindly let me know if you have any additional questions.

Very truly yours,

SHANLEY & FISHER, P.C.

Joseph M. Cerra

JMC/mac
Enclosures
cc: Thomas J. Cafferty, Esq. (w/o encs.)
Peter G. Banta, Esq. (w/o encs.)
Mark P. Denbeaux, Esq. (w/o enc.)
Richard E. Brennan, Esq. (w/o enc.)
Glenn S. Pantel, Esq. (w/o enc.)
John L. Gloria (w/o encs.)

LETTER OF WINNE, BANTA, RIZZI, HETHERINGTON & BASRALIAN, P.C. DATED NOVEMBER 21, 1994 TO NEW JERSEY SUPREME COURT

[Letterhead of Winne, Banta, Rizzi,
Hetherington & Basralian, P.C.]

November 21, 1994

New Jersey Supreme Court
Hughes Justice Complex
CN-963
Trenton, New Jersey 08625

Attention: Mr. DeMarco

Re: Turf Lawnmower vs. Bergen Record Corp.

Dear Mr. DeMarco:

This will respond to your telephone call to me on November 18th requesting a copy of the tape recording of Bruce Locklin at Turf Lawnmower on June 3, 1988.

The original recording by Mr. Locklin was recorded on a microcassette and, due to very high background noise, was of poor quality and much of it could not be deciphered. We sent it out to a commercial audio lab to see if they could improve the quality of the recorded sound so that a better transcript could be made. In turn, we received "enhanced" tapes of this and a cassette of another visit, and I am enclosing the enhanced copy prepared by Knorr Associates. I have made duplicates for Mr. Brennan and myself. Copies of the enhanced tapes were previously sent to plaintiffs' former counsel, Robert H. Jaffe, on July 11, 1991. See attached letter.

I enclose also for the Court a copy of the letter of July 25, 1991 by the principal of Knorr Associates, Norman R. Dotti, P.E., describing the process which was undertaken to filter out background noise and improve the audibility of the conversations.

I comparatively listened to portions of the unenhanced tape and the enhanced tape and found the unenhanced tape hard to follow and impossible in some areas, due to excessive background noise. A copy of the unenhanced tape is also available for the Court if it wishes.

Very truly yours,

Peter G. Banta

PGB:mg
Enclosure

Via Airborne Express

cc: Richard E. Brennan, Esq. (w/enc.)
Thomas Cafferty, Esq. (w/o enc.)

EXCERPTS FROM PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION DATED MARCH 27, 1995 FILED WITH NEW JERSEY SUPREME COURT

SUPREME COURT OF NEW JERSEY
38,043
ON MOTION FOR RECONSIDERATION

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs-Appellants,

vs.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, and MARYANNE DEMARCO,

Defendants-Respondents.

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

SHANLEY & FISHER, P.C.
131 Madison Avenue
Morristown, New Jersey 07962-1979
(201) 285-1000
Attorneys for Plaintiffs-Appellants Turf Lawnmower Repair and John L. Gloria

On the Brief:
Richard E. Brennan
Joseph M. Cerra

ARGUMENT

I

THIS COURT SHOULD RECONSIDER AND MODIFY ITS OPINION OF MARCH 15, 1995.

(A) The failure to distinguish between John L. Gloria and Turf Lawnmower Repair, Inc.

This Court's opinion did not address the distinction between plaintiff John L. Gloria ("Mr. Gloria") and plaintiff Turf Lawnmower Repair, Inc. ("Turf"). Rather, this Court treated the plaintiffs as if they were one and the same and concluded, without discussion, that Mr. Gloria, as an individual, is subject to the actual malice standard in this defamation action. Mr. Gloria is a private person who would ordinarily need to show only defendants' negligence in order to prevail in a defamation action. Moreover, there is not a single allegation in the defendants' report that Mr. Gloria, as an individual, engaged in any conduct violation of the Consumer Fraud Act. Since the allegations of defendants with respect to consumer fraud did not implicate Mr. Gloria personally, his libel case should be remanded for a trial under the appropriate negligence standard.

The defendants bootstrapped Mr. Gloria to the conduct of his business and then leveled a gratuitous personal attack upon him that was neither necessary nor in the public interest. This Court overlooked the undeniable fact that no public interest was advanced by defendants' "sting" on Mr. Gloria personally. Defendants' "public interest" purpose, the unmasking of Turf to the consuming public, could have been accomplished, and should have been accomplished, without the personal defamation of Mr. Gloria. The allegations that Mr. Gloria was vindictive, petty, and unethical -- which this Court recognized were voiced by people with obvious axes

to grind against Mr. Gloria -- were neither newsworthy nor information that advanced the public interest. It added nothing to the public interest aspects of the report.

This Court should address the distinction between Mr. Gloria and Turf. If this Court permits its decision to stand without modification, it will have granted a license to the press not only to comment on business practices of corporate and other business entities, but to destroy the personal reputations of the business owners themselves.

We urge this Court, therefore, to reconsider its holding, at least with respect to Mr. Gloria personally. The rule which should rationally emerge is that while commentary about deceptive business practices which may violate New Jersey's Consumer Fraud Act will be protected by the qualified privilege recognized in Dairy Stores v. Sentinel Publishing Co., Inc., 104 N.J. 125 (1986), the commentators will not be so protected when they stray into the realm of comment on the private persons who own or operate the business.

This is the dichotomy which is just; this is the dichotomy left unmentioned by this Court in its opinion.

* * *